No. 76-1489

In the Supreme Court of the United States

OCTOBER TERM, 1977

HEINZ H. HEITLAND (A17 587 648) AND
HENNELORE HEITLAND (A19 492 601), PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 551 F. 2d 495.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1977. The petition for a writ of certiorari was filed on April 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' illegal, but continuous, physical presence in the United States for more than seven years was meaningfully interrupted by an intervening six-week visit to Germany, thereby rendering them ineligible to

apply for suspension of deportation under Section 244(a) of the Immigration and Nationality Act (8 U.S.C. 1254 (a)).

STATUTORY PROVISION INVOLVED

Section 244 of the Immigration and Nationality Act (the "Act"), 66 Stat. 214, as amended, 8 U.S.C. 1254, provides in pertinent part:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

STATEMENT

1. Petitioner Heinz H. Heitland is a native of Germany who moved to Canada and became a naturalized Canadian citizen (R. 209).[1] In 1963, Mr. Heitland was

[1] "R." refers to the certified administrative record.

married in Canada to petitioner Hennelore Heitland, a native and citizen of Germany (R. 75, 213, 221).

Both petitioners were admitted into the United States in 1968 as nonimmigrant visitors, permitted to remain for not more than six months (R. 184, 201-202). Shortly after their arrival in this country, petitioners illegally obtained employment, in violation of the regulations governing nonimmigrant visitors (Pet. App. 3a-4a; R. 75, 84). When their status as nonimmigrant visitors expired after six months, petitioners remained in the United States without permission (R. 202).

Soon after commencing his employment, Mr. Heitland filed with the Immigration and Naturalization Service an application for adjustment of his status to that of a permanent resident alien based on his employment as a mechanic (R. 198). In August 1968, he left this job and started his own package delivery business (R. 175), abandoning his effort to obtain adjustment of status (Pet. App. 4a).

In December 1970, petitioners and their daughter (who had been born in New York in 1969 (Pet. 5)) went to Germany to visit Mr. Heitland's ailing sister (R. 54, 201). On this trip, Mr. Heitland traveled on a Canadian passport that he had obtained in New York in October 1970; Mrs. Heitland traveled on her German passport and their daughter traveled on a United States passport (R. 17-18, 35). In Germany, Mrs. Heitland obtained a nonimmigrant visitor's visa which authorized her to enter the United States and to remain for six months (R. 179, 207, 234-235).

On February 4, 1971, more than six weeks after their departure, petitioners returned to the United States from Germany. Mrs. Heitland was admitted as a temporary visitor authorized to remain until August 3, 1971; Mr.

Heitland was admitted as a nonimmigrant in transit to Canada; and their child was admitted as a United States citizen (R. 35-36, 197-199, 207, 234-235). Petitioners then resumed residence at the Brooklyn apartment where they had earlier resided.

2. Thereafter, deportation proceedings were instituted charging Mr. Heitland with having entered the United States in February 1971, without a valid immigration visa or entry document, in violation of Sections 241(a)(1) and 212(a)(20) of the Act, 66 Stat. 204, 182-183, 8 U.S.C. 1251(a)(1) and 1182(a)(20) (R. 203), and charging Mrs. Heitland with having remained in the United States after August 3, 1971, without authorization, in violation of Section 241(a)(2) of the Act, 66 Stat. 204, 8 U.S.C. 1251(a)(2) (R. 207). Petitioners conceded their deportability (R. 179, 198-199), but applied for adjustment of status. After protracted litigation, petitioners' application for adjustment of status was denied (Pet. App. 6a-7a).

Petitioners then sought suspension of deportation pursuant to Section 244(a)(1) of the Act, 66 Stat. 214, as amended, 8 U.S.C. 1254(a)(1), which authorizes the Attorney General, in his discretion, to grant relief from deportation to any alien applicant who, *inter alia*, "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application * * *."

The immigration judge denied petitioners' application for suspension of deportation on the ground that petitioners' six-week trip to Germany constituted a break in the continuity of their physical presence required for eligibility for suspension of deportation. The judge noted that their extended trip to another continent could not

be regarded as brief, innocent, or casual since it required petitioners to obtain, prior to departure, three different passports issued by three separate national governments (R. 18). The finding of petitioners' noneligibility for suspension of deportation was affirmed by the Board of Immigration Appeals (Pet. App. 28a-30a) and by the court of appeals, one judge dissenting (Pet. App. 1a-27a).

ARGUMENT

Petitioners' sole contention is that their six-week trip to Germany, which they have chosen to characterize as "brief" and "casual" (Pet. 11), was not "meaningfully interruptive" of the continuity of their physical presence in the United States. The court of appeals correctly held, however, that petitioners' trip abroad constituted a substantial and deliberate interruption of their presence in this country under controlling precedents.

In applying Section 244(a)(1) of the Act, 66 Stat. 214, as amended, 8 U.S.C. 1254(a)(1), to the circumstances presented in any particular case, the Board of Immigration Appeals (Pet. App. 29a-30a) has followed the approach of this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (construing a different section of the Act) and of the Ninth Circuit in *Wadman* v. *Immigration and Naturalization Service*, 329 F. 2d 812 (construing the statute here in issue), by avoiding a technical construction of the statute. Similarly, the court of appeals recognized that "to deny a person the benefits of seven years' continuous residence because of one or two short interruptions might well defeat the purpose of §244(a)(1), since the hardship in such a case would not be substantially different from where the presence has been uninterrupted" (Pet. App. 14a). The court also noted, however, that "[t]he statute surely was not designed to protect the wanderers or the rootless" (*ibid.*).

An absence of six weeks, while perhaps insufficient to classify petitioners among "the wanderers and the rootless," nonetheless was a meaningful interruption of their continuous physical presence in this country. As the court of appeals noted (Pet. App. 16a), the trip was not a brief and casual excursion, or a "sudden, spur-of-the-moment" venture across the border, "undertaken without appreciating the consequences." On the contrary, in order to reach Germany, petitioners had to obtain three different passports (because of their three different nationalities) and had to travel thousands of miles. Indeed, Mr. Heitland's passport was secured some two months prior to the visit, reflecting considerable planning and preparation in advance of the trip.

Viewing the circumstances of this case in their totality, the court of appeals found no reason unduly to stretch the statute in order to benefit petitioners despite their deliberate six-week absence from the United States. Indeed, the court noted that, in securing re-entry to the United States, petitioners had "engaged in a course of conduct directly contrary to a 'policy reflected in our immigration laws' " (Pet. App. 18a). Mr. Heitland gained entry on his Canadian passport as a nonimmigrant in transit to Canada, when his sole intention was to return to his Brooklyn residence and remain permanently in the United States; Mrs. Heitland gained entry on her German passport and nonimmigrant visitor's visa, authorizing her to stay not more than six months. In procuring this visa from the United States Consulate in Germany, Mrs. Heitland "represented expressly or impliedly that she was going to the United States as a visitor," when, in fact, she fully intended to resume permanent residence in Brooklyn (Pet. App. 17a).

Moreover, the court of appeals emphasized that, once petitioners had remained beyond the six-month visitation period for which they were originally admitted in 1968,

they "were at all times present in this country in violation of its laws" (Pet. App. 14a-15a). Although the court of appeals recognized (Pet. App. 15a) that the statute does not explicitly preclude eligibility on this basis, this fact, considered together with the substantial duration of their absence and the implicitly fraudulent circumstances of their re-entry, suggests that denial of the statute's benefits to petitioners does not work the kind of fortuitous hardship decried in *Rosenberg* v. *Fleuti, supra,* and other similar decisions.[2] Although the result in this case may seem harsh, we believe that the court of appeals correctly interpreted the statute in reaching it.

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[2]The cases relied upon by petitioners (Pet. 10) are factually distinguishable and not in conflict with the present case. In *Git Foo Wong* v. *Immigration and Naturalization Service,* 358 F. 2d 151 (C.A. 9), the alien's sole excursion outside the United States consisted of a two-hour sightseeing trip to Mexico, and was thus not meaningfully interruptive of his continuous presence in this country. In *Toon-Ming Wong* v. *Immigration and Naturalization Service,* 363 F. 2d 234 (C.A. 9), the six-month absence of a 16-year-old youth was neither voluntary nor accompanied by a realization of its possible consequences, because the youth's absence was ordered by his foster father. In *McLeod* v. *Peterson,* 283 F. 2d 180 (C.A. 3), the alien's departure from the United States was found to have been induced by improper actions on the part of the immigration authorities; under these circumstances the court held that the alien's departure did not interrupt the continuity of his presence in the United States. *Id.* at 187.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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